STATE OF MICHIGAN

COURT OF APPEALS

FLAGSTAR BANK,

Plaintiff-Appellee,

v

PREMIER LENDING CORPORATION,

Defendant,

and

WILLIAM HERSH, d/b/a HERSH ENTERPRISES,

Defendant-Appellant.

UNPUBLISHED
March 24, 2011

No. 295211
Oakland Circuit Court
LC No. 2008-093084-CK

Before: CAVANAGH, P.J., and JANSEN and SERVITTO, JJ.

PER CURIAM.

In this breach of contract action, defendant William Hersh appeals by right the circuit court's order granting summary disposition in favor of Flagstar Bank ("Flagstar"). We affirm.

I

William Hersh was one of the owners of defendant Premier Lending Corporation. In November 2001, Hersh, doing business as Hersh Enterprises, (hereinafter "Hersh") and Flagstar entered into a written Broker Agreement, under which Hersh agreed to originate loans to certain borrowers and to sell those loans to Flagstar. Hersh warranted that all information submitted in any given borrower's loan application would be true and accurate, and agreed to buy back certain loans or reimburse Flagstar for a variety of reasons, including any losses that were incurred by Flagstar as the result of a borrower's fraudulent misstatements.

Hersh originated two loans for borrower Samuel Newland and sold those loans to Flagstar. The two loans were closed in May 2005, for the purpose of financing Newland's purchase of Units 6 and 7 in a condominium complex in Marietta, Georgia. Flagstar subsequently sold the two mortgage loans to Countrywide Bank ("Countrywide"). In 2007, Countrywide discovered through its own efforts that Newland had failed to disclose on his initial loan applications to Flagstar that he had already purchased Units 1, 3, 8, 9, 11, and 12 in the same condominium complex. Countrywide further discovered that all of these additional

condominium units were mortgaged, as were Units 6 and 7, and that Newland had not disclosed this fact. Countrywide believed that Newland had committed fraud on his loan applications to Flagstar, and therefore demanded that Flagstar repurchase the two mortgage loans. In June 2007, Flagstar repurchased the two mortgage loans from Countrywide.

Thereafter, Newland apparently defaulted on the two mortgage loans. Flagstar foreclosed the mortgages and acquired Units 6 and 7, bidding a total of approximately $380,471 for the two properties. Flagstar then re-sold the properties to a third party in October 2007, incurring a loss of about $237,171.

Flagstar demanded that Hersh and Premier Lending Corporation reimburse it for its losses, but they refused. Thus, Flagstar sued both Hersh and Premier Lending Corporation in the Oakland Circuit Court. Flagstar argued that, under the Broker Agreement, Hersh and Premier Lending Corporation were required to repurchase the bad mortgage loans or to reimburse it for any losses that were caused by Newland's fraudulent misstatements in his loan applications.

Premier Lending Corporation did not appear in the matter and Flagstar obtained a default judgment against it.[1] Hersh, personally, did file an answer and defend the action. However, Hersh argued that he had effectively assigned all his rights and responsibilities under the Broker Agreement to Premier Lending Corporation and that he therefore could not be found liable in his personal capacity. Hersh also argued (1) that Flagstar's losses were not related to Newland's misrepresentations in his initial loan applications, (2) that because Flagstar had already foreclosed the mortgages and re-sold the subject properties, there were necessarily no loans remaining for him to repurchase, and (3) that Flagstar's claims were barred by a variety of equitable doctrines such as laches and unclean hands.

The circuit court rejected Hersh's arguments and granted summary disposition in favor of Flagstar, reasoning in relevant part:

> The defendant argues first that the plaintiff is precluded from seeking to enforce the broker agreement because the borrower's default was unrelated to the nondisclosures in the application, and defendant was not aware of the nondisclosures. These arguments ignore the language of the broker agreement. The defendant warranted that all information in the lending documents was true and accurate, and not merely that he lacked knowledge of any inaccuracies. There is no requirement in the repurchase provision that the fraud in the transaction somehow also be the cause of the subsequent default on the loan.
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> The defendant further argues that the plaintiff violated a condition precedent by not demanding that the defendant repurchase the loan before the defendant foreclosed. The defendant argues that by failing to do so, there was no loan for the defendant to repurchase. The Court would observe that there is

[1] It appears that Premier Lending Corporation has been dissolved and is no longer collectible.

> nothing in the warranty language or the repurchase provision that required the plaintiff to make a demand on the defendant before foreclosing on the property. The argument that the foreclosure extinguished the debt so that there was nothing to repurchase is simply incorrect. If the sale of the property fails to satisfy the amount owing, the noteholder may seek a deficiency judgment. *First of America Bank v Brown*, 158 Mich App 76, 78; 404 NW2d 706 (1987). The debt is not extinguished merely because the security has been foreclosed. *Id*. After repurchasing the loan, the defendant would have had the same rights to pursue the borrower on the deficiency as the bank had.
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> The defendant next argues that the plaintiff's claims are barred by laches. Although the equitable doctrine of laches may be asserted in an action at law, *Eberhard v Harper-Grace Hospitals*, 179 Mich App 24; 445 NW2d 469 (1989), the Court sees no basis for its application in this case. The delay from the time of the breach until the time of the lawsuit was far less than the six-year statute of limitations. The Court has already rejected defendant's argument that the delay until after the foreclosure left him with nothing to repurchase. The Court will not apply laches in such a way as to supply new terms to the contract that the defendant did not negotiate.
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> The defendant next argues that the plaintiff should be barred from seeking equity based on unclean hands. The defendant is suing for breach of contract and is seeking contract damages. The doctrine of unclean hands has no bearing here.
>
> The defendant further argues that he should not be personally liable doing business as Hersh Enterprises because he assigned the contract to Premier Lending Corporation. . . . The assignment was a unilateral act of the defendant. The plaintiff never consented to the assignment in writing. The assignment was not effective to substitute Premier Lending for Hersh Enterprises.

The circuit court subsequently entered judgment in favor of Flagstar in the amount of $261,214.10, plus certain costs and attorney fees.

II

We review de novo the circuit court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Contract interpretation presents a question of law, which we also review de novo. *DaimlerChrysler Corp v G Tech Prof Staffing, Inc*, 260 Mich App 183, 184-185; 678 NW2d 647 (2003).

III

Hersh argues that the circuit court erred by granting summary disposition in favor of Flagstar. We disagree.

Under the Broker Agreement, Hersh expressly warranted that all documents and loan applications would be "in every respect valid and genuine, being what they [pur]port to be and

all information submitted in each Mortgage Loan Document is true and accurate." The Broker Agreement contained *no* exceptions to this warranty. Moreover, the Broker Agreement provided that Hersh agreed to "immediately repurchase" any mortgage loan from Flagstar for certain enumerated reasons, including: (1) if "Flagstar reveals any evidence of fraud in the origination and closing of the Mortgage Loan by . . . the Borrower," (2) if Hersh "fails to observe or perform or breaches in any material respect any of the representations, warranties, or agreements contained in this Agreement," or (3) if "Flagstar is required to repurchase said Mortgage Loan from . . . any other third party investor for any reason involving the origination or closing of the Mortgage Loan." Furthermore, the Broker Agreement provided that "[t]his agreement is not assignable by [Hersh] without the prior written consent of Flagstar." It is undisputed that Hersh's attempt to assign his rights and responsibilities under the Broker Agreement to Premier Lending Corporation was never approved by Flagstar.

Hersh contends that he assigned all of his rights and responsibilities under the Broker Agreement to Premier Lending Corporation, and that he therefore cannot be liable to Flagstar as a matter of law. He takes great pains to persuade us that it was Premier Lending Corporation—and not Hersh—who originated the loans to Newland, signed the relevant documents, and was listed as the original "Lender." But this does not negate the fact that the Broker Agreement was, by its own clear language, not assignable without Flagstar's express written consent. When the language of a contract is clear and unambiguous, the agreement must be enforced and applied as written. *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1999). Nor can we agree with Hersh's argument that because Flagstar somehow acquiesced in his attempted assignment, Flagstar should be estopped from claiming otherwise. We agree with the general proposition that an anti-assignment clause may be waived. 29 Williston, Contracts (4th ed), § 74:22, p 369. A waiver is the intentional and voluntary relinquishment of a known right. *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 204; 747 NW2d 811 (2008). But "a waiver cannot be inferred by mere silence." *Moore v First Security Cas Co*, 224 Mich App 370, 376; 568 NW2d 841 (1997). Instead, the waiver of a legal right generally requires a clear, unequivocal, and decisive act by the waiving party. *Grix v Liquor Control Comm*, 304 Mich 269, 275; 8 NW2d 62 (1943); see also *Lewis v LeGrow*, 258 Mich App 175, 195; 670 NW2d 675 (2003). We perceive no clear, unequivocal, and decisive act by Flagstar evidencing its intent to waive the anti-assignment clause contained in the Broker Agreement. Nor has Hersh directed our attention to any such affirmative act by Flagstar on appeal. We also reject Hersh's argument that Flagstar should be estopped from enforcing the anti-assignment clause. There can be no estoppel in this case because Flagstar did not mislead Hersh to his prejudice. *Grix*, 304 Mich at 275. Hersh's arguments in this regard must fail.

Hersh also complains that Newland's default (and, by extension, Flagstar's ultimate loss) was not caused by any reason involving the origination or closing of the loans, but was instead caused by the unexpected, significant downturn in the United States economy that occurred during the time period in question. However, this does not change the fact that Hersh warranted that "all information submitted in each Mortgage Loan Document is true and accurate," and agreed that he would repurchase the loans from Flagstar upon "fail[ing] to observe or perform or breach[ing] in any material respect any of the representations, warranties, or agreements contained in this Agreement[.]" As noted previously, if the language of a contract is clear and unambiguous, the agreement must be enforced as written. *Frankenmuth Mut Ins*, 460 Mich at 111. It is beyond material factual dispute that the information contained in Newland's loan

applications was not "true and accurate," and it necessarily follows that Hersh breached one of the warranties contained in the Broker Agreement. Therefore, assuming that this breach was "material," Hersh is obligated to repurchase the loans pursuant to the abovementioned contractual language. No reasonable mind could disagree that the omitted information, which would have been necessary in order to make Newland's applications "true and accurate" as Hersh warranted, would have been of material importance to Flagstar at the time it originally purchased the loans from Hersh. See *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). We therefore conclude that Hersh breached the warranty concerning the truth and accuracy of the statements in Newland's loan applications in a "material respect."

Hersh voluntarily chose to enter into the Broker Agreement with Flagstar and to originate complex mortgage loans under that agreement. "Michigan law presumes that one who signs a written agreement knows the nature of the instrument so executed and understands its contents." *Watts v Polaczyk*, 242 Mich App 600, 604; 619 NW2d 714 (2000). "Moreover, mere failure to read an agreement is not a defense in an action to enforce the terms of a written agreement." *Id*. Although Hersh now complains that enforcement of the Broker Agreement as written will result in unfairness, Hersh may not rely on such arguments to escape the plain language of the contract. See *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51; 664 NW2d 776 (2003). "[T]he unilateral subjective intent of one party cannot control the terms of a contract." *Burkhardt v Bailey*, 260 Mich App 636, 656; 680 NW2d 453 (2004). The law presumes that the parties understand the import of a written contract and had the intention manifested by its terms. *Id*. Irrespective of Hersh's subjective understanding of the Broker Agreement, the agreement clearly provides that Hersh will buy back mortgage loans from Flagstar upon his material breach of any of the warranties contained in the agreement. We perceive no error in the circuit court's ruling.

Lastly, we must reject Hersh's argument that Flagstar's claims are barred by the doctrine of laches and that Flagstar has acted with unclean hands in this case. The circuit court observed that the delay from the time of Hersh's breach of the Broker Agreement until the time of the instant lawsuit was "far less than the six-year statute of limitations" for contract claims. See MCL 600.5807(8). Despite the circuit court's apparent belief to the contrary, we fully acknowledge that "[i]f laches applies, a claim may be barred even though the period of limitations has not run. The application of laches can shorten, but never lengthen, the analogous period of limitations." *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 456-457; 761 NW2d 846 (2008). "Thus, laches may bar a legal claim even if the statutory period of limitations has not yet expired." *Id*. However, in order for the doctrine of laches to shorten the period for making a claim, there must be a showing of "compelling equities." *Lothian v Detroit*, 414 Mich 160, 170; 324 NW2d 9 (1982). We perceive no compelling equities in the present case. Nor can Hersh establish that Flagstar acted with unclean hands. The doctrine of unclean hands "closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief . . . ." *Stachnik v Winkel*, 394 Mich 375, 382; 230 NW2d 529 (1975). We cannot conclude that Flagstar acted with unclean hands merely because it foreclosed the subject mortgages and sold the properties at issue in this case. Indeed, it appears that Flagstar foreclosed the mortgages and sold the properties in an effort to mitigate its own damages. Flagstar's reasonable attempt to mitigate its own losses does not establish the bad faith or unfairness that would be necessary to invoke the doctrine of unclean hands. See *Richards v Tibaldi*, 272 Mich App 522, 537; 726 NW2d 770 (2006).

IV

The circuit court properly applied the plain and unambiguous language of the Broker Agreement as written. There remained no genuine issues of material fact concerning Hersh's breach of the Broker Agreement or Flagstar's right under that agreement to require Hersh to repurchase the subject mortgages. For the foregoing reasons, we cannot conclude that the circuit erred by granting summary disposition or entering judgment in favor of Flagstar.

Affirmed. As the prevailing party, Flagstar may tax costs pursuant to MCR 7.219.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Deborah A. Servitto